

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUN 23 1997

In the Matter of )  
 )  
Broadband PCS )  
C and F Block )  
Payment Issues )  
 )  
Amendment of Part 1 )  
of the Commission's Rules -- )  
Competitive Bidding Proceeding )

Federal Communications Commission  
Office of Secretary

Public Notice DA 97-679

W.T. Docket No. 97-82

COMMENTS OF BAY SPRINGS TELEPHONE COMPANY, INC.

Bay Springs Telephone Company, Inc. ("Bay Springs") hereby opposes the proposal by several broadband personal communications ("PCS") C block companies (the "Petitioners") requesting the Federal Communications Commission ("FCC") to change the payment schedule for broadband PCS C and F block licensees from quarterly to annual installments.<sup>1</sup>

<sup>1</sup> Letter from Thomas Guterrez, Esq. *et al* to Michele C. Farquhar, Esq. Chief, Wireless Telecommunications Bureau (Mar. 13, 1997) ("C Block Letter"). Petitioners include Alpine PCS, Inc.; DCR PCS, Inc.; Eldorado Communications L.L.C.; Indus, Inc.; KMTel L.L.C.; Mercury PCS, L.C.C.; Microcom Associates; NextWave Communications, Inc.; and R&S PCS, Inc.

## I. INTRODUCTION

Bay Springs is a small rural telephone company. Yet, despite its small size, it was precluded from participating in the C and F block license auctions due to its affiliation with other small rural telephone companies, and with small interexchange carriers. Bay Springs was the highest bidder on certain D and E block licenses, for which it was required to pay in full and in one lump sum.

The Commission has already provided the C and F block licensees with an unfair competitive advantage over Bay Springs by allowing them to avoid the payment of 25 percent of their license bids and then permitting them to pay off the balance of those bids in quarterly installments, stretched over a period of ten full years. To now permit the C and F block licensees to further delay any payments for their licenses through annual installments would undermine the public interest by placing the federal government in the role of choosing who will or will not succeed in the market. To grant the Petitioners' requests would send the wrong message: that there is no consequence to bidding on licenses that you cannot afford as the Commission will change the rules after the auction is over.

Bay Springs submits the following response to the Commission's Public Notice DA 97-679, released on June 2, 1997, inviting comments on the payment schedule proposal and other proposed alternative financing arrangements for C and F block licenses.<sup>2</sup> Bay Springs urges the Commission to maintain the status quo and refrain from altering the current payment cycle and financing rules. Additionally, Bay Springs agrees with Cook Inlet that the Commission must lift

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<sup>2</sup> Broadband PCS C and F Block Installment Payment Issues, *Public Notice* (June 2, 1997) ("Public Notice").

the current suspension on the installment payment deadline.<sup>3</sup> Those that paid for licenses in the D and E block auctions did so with the expectation that their competitors holding C or F block licenses would be required to at least make quarterly installment payments in accordance with the Commission's rules.

II. THERE IS NO NEED TO ALTER THE COMMISSION'S INSTALLMENT PAYMENT PLAN.

The Petitioners assert that the installment plan change "will provide small businesses with greater flexibility to time their fund raising activities around favorable market conditions or when competition for funding is less congested."<sup>4</sup> They claim the unpredictable nature of financial markets has placed a strain on the ability of C block licensees to finance their ventures.<sup>5</sup> They further contend that a switch to annual payments would be consistent with Section 309(j)<sup>6</sup> and the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>7</sup> both designed to promote the ability of small businesses to enter new markets.

The request to change the payment schedule from quarterly to annual may be called for if all or most C block participants were faltering under the current regime. But, this is not the

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<sup>3</sup> See Public Notice, App. D at 10 ("Cook Inlet Petition").

<sup>4</sup> Public Notice, App. A at 3.

<sup>5</sup> See generally Public Notice, App. C at 2.

<sup>6</sup> 47 U.S.C. § 309(j). The competitive bidding rules were designed to promote efficiency and encourage only serious participants.

<sup>7</sup> Pub. L. No. 104-121, 110 Stat. 847 (1996), *codified at* 5 U.S.C. § 601.

case.<sup>8</sup> Nearly all other C block licensees have managed to make their installment payments on time.

In fact, several companies that made their quarterly payments without the knowledge that the Commission had suspended the March 31, 1997 deadline for payment<sup>9</sup> have already requested refunds.<sup>10</sup> These companies extended capital to meet their installment payment obligations, while others that were granted temporary waivers or for some reason knew the payment deadline would be suspended, held onto their capital. Because the Petitioners have been able to rely on this excess capital to devote to marketing and development, they have been unjustly enriched. They remain unjustly enriched every day the suspension continues; thus, the Commission should lift the suspension immediately.

The companies requesting annual installment payments claim that the increasingly competitive market for wireless communications services is driving their need to defer installment payments. They claim to need to concentrate their capital immediately on "infrastructure development and job creation" instead of honoring their financial obligations to

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<sup>8</sup> There were 493 C Block licenses auctioned in all. *Broadband Personal Communications Services C Block Auction Closes*, FCC News, May 6, 1996. Of the scores of licensees, only 9 of them have petitioned the Commission to alter the installment payment schedule from quarterly to annually because of their difficulties in making the payments. See Public Notice at 1 n.1.

<sup>9</sup> See *Order*, In the Matter of Installment Payments for PCS Licenses, DA 97-649 (released Mar. 31, 1997).

<sup>10</sup> Public Notice, Apps. F-H (letters requesting that paid quarterly installment payments be refunded to Southeast Wireless Communications, L.P., Comtel PCS Mainstreet L.P., and Americall International, L.L.C. respectively).

the Commission.<sup>11</sup> These companies are in effect, asking that the Commission provide preferences that give them advantages over their competitors. Such action would be discriminatory, and cannot stand.

III. ALTERING THE INSTALLMENT PAYMENT PLAN WOULD  
DEFEAT THE FAIRNESS AND INTEGRITY OF THE  
COMMISSION'S AUCTION RULES.

The Commission adopted installment payments for designated entities to address the huge costs associated with obtaining a broadband PCS license. "Installment payments directly address the significant barriers that smaller businesses face in accessing private financing."<sup>12</sup> While the Commission was sensitive to small businesses' lack of access to capital, it also recognized that it would have to place stringent payment requirements on the entities eligible for installment payments. "An eligible designated entity that elects installment payments will have its license conditioned on the full and timely performance of its payment obligations."<sup>13</sup>

The petitioners contend that because the quarterly payment requirement is found in each licensee's Note and Security Agreement and not in any Commission rule, no rule waivers are

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<sup>11</sup> Public Notice, App. A. at 3.

<sup>12</sup> *In re* Implementation of Section 309(j) of the Communications Act - Competitive Bidding *Fifth Report and Order* 9 FCC Rcd 5532, para. 135 (1994).

<sup>13</sup> *In re* Implementation of Section 309 (j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, para. 240 (1994).

required to process their request to switch to annual payments.<sup>14</sup> They state that the Commission only needs to reform the terms of the agreements and the licensees may consent to re-executing them.<sup>15</sup>

This seemingly simple procedure ignores the fact that other companies have participated in auctions with the understanding that the C and F block licensees would remain obligated to make quarterly payments. To change the schedule at this stage effectively undermines the business plans of companies that relied on the fact that C and F block licensees had to make quarterly payments. Additionally, the Petitioners seek an annual payment schedule giving them nine more months before the next payment is due. To allow them this advantage lies contrary to FCC competitive bidding policies meant to discourage speculation and encourage only “legitimate applicants who can attract capital.”<sup>16</sup> The Petitioners’ requests for an annual payment schedule and its accompanying nine month reprieve from any installment payment obligation is contrary to their certification prior to the auction that they are financially qualified.

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<sup>14</sup> C Block Letter at 1 n.2.

<sup>15</sup> *Id.*

<sup>16</sup> *In re* Implementation of Section 309 (j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, para. 104 (1994) (“Fifth Memorandum Opinion and Order”).

IV. THE COMMISSION HAS ALREADY DETERMINED  
ALTERNATIVE FINANCING PLANS NOT TO BE IN THE  
PUBLIC INTEREST.

During the auction rule making process, other companies proposed different alternative financing arrangements for broadband PCS C and F Block licenses for many of the same reasons suggested by the Petitioners. One of Petitioners' proposals requests the Commission to defer any payments and accrue interest for the first five years of the license term.<sup>17</sup> Bay Springs concurs with Cook Inlet's statement that an action of this nature would deprive the government of billions of dollars.<sup>18</sup> The Commission already determined the negative effects this approach could have on competition in its Fifth Memorandum Opinion and Order when it declined to eliminate or reduce interest rates even before the auctions took place.<sup>19</sup> To defer interest payments at this stage would similarly inhibit competition.

Another proposal suggests that the Commission initiate these changes on an individual waiver basis "to allow the Commission to take the unique circumstances of each licensee into account."<sup>20</sup> Bay Springs agrees with Cook Inlet in that this approach amounts to a "private" waiver mechanism without the opportunity for notice and comment.<sup>21</sup> The Petitioner's proposals are antithetical to the competitive PCS marketplace anticipated by the Commission when it crafted its PCS rules.

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<sup>17</sup> See Public Notice, App. C at 3.

<sup>18</sup> Cook Inlet Petition at 5.

<sup>19</sup> See Fifth Memorandum Opinion and Order, para. 104.

<sup>20</sup> Public Notice, App. B at 3 (MCI's Letter).

V. NOT MEETING INSTALLMENT PAYMENT DEADLINES  
CONSTITUTES DEFAULT, AND TRIGGERS NECESSARY  
REAUCTIONS.

The Commission has stated that PCS licenses are contingent on the licensee timely making its installment payments. If Petitioners cannot meet their installment payment deadlines, then they are in default and forfeit their license(s), which the Commission shall re-auction. A default is indicative of the licensee's inability to pay for the build-out of its system, or provide service to the public, and generally shows its lack of fitness to be a Commission licensee.

The Commission does not allow applicants that default on up-front payments to bid in license auctions. "One of the principal purposes of these [payment] requirements is to ensure that only serious and financially qualified bidders participate in the auction."<sup>22</sup> The quarterly schedule for installment payments serves the same purpose. Accordingly, the Commission cannot allow licensees that fail to make their installment payments to continue to hold those licenses, and therefore delay service to the public.

The best action the Commission can take upon a default of a license payment is to re-auction the subject license.

As we stated in the Second Report and Order, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best cause of action is to re-auction . . . . Although we recognize that this may cause a brief delay in the initiation of service to the public, circumstances may change so significantly during the time between the original

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<sup>21</sup> *Id.* App. D at 5.

<sup>22</sup> Broadband Personal Communications Services (Further Reconsideration of Competitive Bidding Rules), 76 RR 2d 561, 572 (1994).



auction and the disqualification as to alter the value of the BTA service area to auction participants, as well as to parties who did not participate. In this situation, awarding BTA authorizations to the parties that value them most highly can best be assured through a re-auction.<sup>23</sup>

The Commission extended its re-auction policy to other services,<sup>24</sup> and the Wireless Telecommunications Bureau upheld this policy in denying two motions for stay of the re-auction of Interactive Video and Data Service ("IVDS") licenses.<sup>25</sup> In that decision, the Bureau demonstrated how not re-auctioning the defaulters' licenses to allow them more time to locate finances would violate the Act and disserve the public interest by creating unfairness to other auction applicants and licensees.

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<sup>23</sup> Multipoint Distribution Service (Filing Procedures and Competitive Bidding Rules), 78 RR 2d 856, 894 (1995)(citations omitted).

<sup>24</sup> See General Wireless Communications Service, 78 RR 2d 1173 (1995)(in the event that an auction winner defaults or is otherwise disqualified, the Commission will re-auction the license either to existing or new applicants).

<sup>25</sup> See Auction of Interactive Video and Data Service Licenses, 6 CR 134 (Wireless Bur., 1997).

[W]e find that a grant of the Stay Requests would not serve the public interest, for doing so would defeat the overarching policy objectives of the auction statute, which requires the FCC, in designing an auction system, to promote the “rapid deployment of new technologies, products and services for the benefit of the public ....” If we were to accept the general arguments for granting the stay . . . , subsequent spectrum re-auctions would be at risk of substantial postponement while courts reviewed the myriad issues parties raised in attempts to circumvent re-auctions for their individual purposes, such as procuring additional funds to cure a default in payment obligations. . . . [T]hese parties’ weak arguments on the merits do not warrant the extraordinary relief they seek; granting such relief would simply reward those who fail to make timely payments at the expense of the public interest by frustrating the business plans of entities planning to bid on and pay for IVDS licenses in the upcoming auction and initiate service to the public. Such a result would defeat the integrity of the expeditious auction process, unduly delaying the Commission from realizing its statutory obligations.<sup>26</sup>

Allowing Petitioners to skirt their installment payment obligations would create the same unfairness in this situation. The Commission should not allow Petitioners to create uncertainty in the Commission’s payment rules for their “individual purposes,” which are to procure additional funds to make their payments. Petitioners were supposed to have these finances in hand to comply with the Commission’s rules.

Furthermore, PCS licensees such as Bay Springs, which devised their bidding strategies and payment plans with the Commission’s rules in mind, suffer as Petitioners are rewarded with an indefinite freeze on their installment payment obligations. This results in rewarding those that ignore the Commission’s auction rules; a result that the Commission cannot tolerate. Instead, the Commission should enforce its rules in a non-discriminatory manner, as it has for all auction licensees to date, to ensure fair competition among all PCS licensees.

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<sup>26</sup> Id. at 136.

### CONCLUSION

For all of the foregoing reasons, Bay Springs respectfully requests the Commission to enforce its well-settled payment rules, and re-auction licenses when there is a default on quarterly installment payments in the interests of maintaining the auction rules' integrity, and accelerating service to the public by more financially qualified licensees serving the public interest.

Respectfully submitted,

BAY SPRINGS TELEPHONE COMPANY, INC.

By: 

June 23, 1997

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 23, 1997, copies of the foregoing Comments were mailed, first-class, postage prepaid, to the following:

Sande Taxali  
Auctions and Industry Analysis Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, NW, Room 5322  
Washington, DC 20554  
(\*Two hand-delivered copies)

Thomas Gutierrez  
David A. LaFuria  
Lukas, McGowan, Nace & Gutierrez, Chartered  
Suite 1200  
1111 Nineteenth Street, NW  
Washington, DC 20036  
(Counsel to Alpine PCS, Inc.; Eldorado Communications, L.L.C.; KMTel, L.L.C.; Mercury PCS, L.L.C.; Miccom Associates)

Philip L. Verveer  
Jennifer A. Donaldson  
Willkie Farr & Gallagher  
1155 21st Street, NW, Suite 600  
Washington, DC 20036-3384  
(Counsel to INDUS, Inc.)

Leonard J. Kennedy  
Richard S. Denning  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(Counsel to R&S PCS, Inc.)

William R. Richardson, Jr.  
Lynn R. Charytan  
Wilmer, Cutler & Pickering  
2445 M Street, NW  
Washington, DC 20037-1420  
(Counsel to DCR PCS, Inc.)

Michael R. Wack  
Vice President - Regulation & Senior Counsel  
NextWave Communications, Inc.  
1101 Pennsylvania Avenue, NW  
Washington, DC 20004

Leonard S. Sawicki  
Director, FCC Affairs  
MCI Telecommunications Corporation  
1801 Pennsylvania Avenue, NW  
Washington, DC 20006-3606

James H. Barker  
Michael S. Wroblewski  
Latham & Watkins  
1001 Pennsylvania Avenue, NW, Suite 1300  
Washington, DC 20004  
(Counsel to Fortunet Communications, L.P. and Southeast Wireless Communications, L.P.)

Joe D. Edge  
Mark F. Dever  
Tina M. Pidgeon  
Drinker Biddle & Reath LLP  
901 Fifteenth Street, NW  
Suite 900  
Washington, DC 20005  
(Counsel to Cook Inlet Region, Inc.)

Sylvia Lesse  
Kraskin & Lesse, LLP  
2120 L Street, NW, Suite 520  
Washington, DC 20037

(Counsel to Comtel PCS Mainstreet Limited Partnership)

Julia F. Kogan

Hogan & Hartson, L.L.P.

555 Thirteenth Street, NW

Washington, DC 20004-1109

(Counsel to Americall International LLC)

By: M. De English